Supreme Court, U.S.
FILED

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

CEDRIC W. MOBLEY, CHESTER NASH, JR., and CHAD E. LYNN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of military defendants' right to present a defense.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Armed Forces in these cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces in *Mobley* (App., *infra*, 1a-5a) is reported at 44 M.J. 453. The opinion of the United States Court of Appeals for the Armed Forces in *Nash* (App., *infra*, 6a-10a) is reported at 44 M.J. 456. The opinion of the United States Court of Appeals for the Armed Forces in *Lynn* (App., *infra*,

25a-29a) is not yet reported. The opinions of the United States Air Force Court of Criminal Appeals in *Mobley* (App., *infra*, 11a-14a), *Nash* (App., *infra*, 15a-24a), and *Lynn* (App., *infra*, 30a-38a) are unreported.

JURISDICTION

The judgments of the court of appeals in *Mobley* and *Nash* were entered on September 18, 1996. By order dated December 10, 1996, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari in those cases to and including January 16, 1997. The judgment of the court of appeals in *Lynn* was entered on October 10, 1996. By order dated December 26, 1996, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari in that case to and including February 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

Military Rule of Evidence 707 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The Fifth and Sixth Amendments to the United States Constitution are reprinted at App., *infra*, 39a-40a.

STATEMENT

1. These cases involve the constitutional validity of a rule excluding from court-martial proceedings in the armed forces any evidence of a polygraph examination. In broad terms, a polygraph examination is a credibility assessment; it is based on an expert examiner's interpretation of physiological responses that are controlled by the subject's autonomous nervous system. After a preliminary interview with the subject, the examiner asks a number of questions while measuring the subject's relative blood pressure (obtained from an inflated cuff on the upper arm) and other indications of blood flow, his "galvanic skin response" (*e.g.*, palmar sweating), and his respiration (obtained from sensors placed on the subject's chest or abdomen). The questions asked in most tests ordinary fall into three broad categories: direct accusatory questions concerning the matter under investigation, irrelevant or neutral questions, and more general (so-called "control") questions concerning whether the subject has engaged in wrongdoing. The examiner forms an opinion with respect to the subject's truthfulness by comparing the subject's physiological reactions to each set of questions. See generally 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* 219-222 (2d ed. 1993); C. Honts & B. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D. L. Rev. 987, 989-993 (1995).

In *United States* v. *Gipson*, 24 M.J. 246 (1987), the Court of Military Appeals (now the Court of Appeals for the Armed Forces) concluded that polygraph techniques had reached a sufficient degree of reliability that evidence of a polygraph examination should not be routinely excluded from court-martial

proceedings under Military Rule of Evidence 702.[1] The court noted that "[i]f anything is clear, it is that the battle over polygraph reliability will continue to rage," but it concluded that "until the balance of opinion shifts decisively in one direction or the other, the latest developments * * * should be marshaled at the trial level." 24 M.J. at 253. Accordingly, the court held that a serviceman who testifies at his court-martial trial is entitled to lay a foundation showing the scientific basis for polygraph results consistent with his exculpatory testimony. *Id.* at 252-253.

On June 27, 1991, "[by] the authority vested in [him] as President by the Constitution of the United States and by chapter 47 of title 10 of the United States Code [*i.e.*, the Uniform Code of Military Justice (UCMJ)]," the President responded to *Gipson* by promulgating Military Rule of Evidence 707.[2] See Exec. Order No. 12,767, 3 C.F.R. 334, 339-340 (1991 comp.). The drafters' commentary that accompanied the rule explained its adoption by reference to several policies:

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[1] Military Rule of Evidence 702, like its counterpart in the Federal Rules of Evidence, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[2] Article 36(a) of the UCMJ, 10 U.S.C. 836(a), provides that "[p]retrial, trial, and post-trial procedures, including modes of proof * * * may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

> There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near-infallibility." *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). * * * There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the [court-martial] members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of the polygraphs. * * * Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence.

See *Manual for Courts-Martial, United States* A22-48 (1995). Those considerations, the drafters stated, warrant "a bright-line rule that polygraph evidence is not admissible by any party to a court-martial." *Ibid.*

On September 18, 1996, in *United States* v. *Scheffer*, 44 M.J. 442, the Court of Appeals for the Armed Forces held that Rule 707 violates the Sixth Amendment, in cases in which the accused wishes to introduce polygraph results consistent with his exculpatory testimony, because the rule compels the military judge to exclude relevant, material, and favorable evidence offered by the accused. 44 M.J. at 445-446.

2. This petition involves three cases in which the accuseds were convicted of various offenses after general courts-martial. After the findings and sentence

were affirmed by the Air Force Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces returned the records to the respective convening authorities for further proceedings in accordance with *Scheffer*.

a. In *Mobley*, respondent was charged with using and possessing cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. 912a. See App., *infra*, 1a-2a. At trial, respondent claimed that he did not recall ingesting cocaine and sought to rely on the testimony of a private polygraph examiner, who had examined respondent concerning the drug charges. Relying on Rule 707, the military judge declined to permit respondent to lay a foundation for the admission of the polygraph evidence; the military judge also rejected respondent's claim that "Rule 707 is unconstitutional." App., *infra*, 3a. Respondent was convicted on one specification of wrongfully using cocaine. He was acquitted on a second specification of using cocaine and one specification of possessing cocaine. He was sentenced to a bad-conduct discharge, confinement and partial forfeitures of pay for 12 months, and reduction to the lowest enlisted grade. *Id.* at 1a-2a.

The Air Force Court of Criminal Appeals affirmed (App., *infra*, 11a-14a), but the Court of Appeals for the Armed Forces remanded for further proceedings (*id.* at 1a-5a). Relying on its decision in *Scheffer*, *supra*, the Court of Appeals for the Armed Forces held "that the military judge erred by applying a *per se* exclusionary rule to [respondent's] proffered evidence," because respondent was "entitled to offer evidence of the scientific theory underlying polygraph evidence and application of that theory to" him at an appropriate hearing. App., *infra*, 4a. Judges Sullivan and Crawford dissented. *Id.* at 5a.

b. In *Nash*, respondent was charged with using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. 912a. See App., *infra*, 6a. Before trial, respondent underwent two polygraph examinations. The first was conducted by a private examiner who concluded that respondent indicated no deception; the second one was administered by the Air Force Office of Special Investigations, and it reached the opposite conclusion. *Id.* at 7a. Relying on Rule 707 and on the conflicting nature of the available polygraph evidence, the military judge ruled that neither the defense nor the government would be permitted to present such evidence. App., *infra*, 7a-8a. Respondent testified at trial that he did not know why his urine tested positive for cocaine. *Id.* at 8a. He was convicted and sentenced to a bad-conduct discharge, confinement for three months, and reduction to the lowest enlisted grade. *Id.* at 6a.

The Air Force Court of Criminal Appeals affirmed (App., *infra*, 15a-24a), but the Court of Appeals for the Armed Forces set aside that ruling (*id.* at 6a-10a). Relying on its decision in *Scheffer*, *supra*, the Court of Appeals for the Armed Forces held that it was error for the military judge to rely "on the *per se* exclusion under Mil. R. Evid. 707." App., *infra*, 9a. The court also concluded that the military judge erred to the extent he relied on the anticipated conflict between experts in respondent's case. *Ibid.* The court noted that "[i]n other areas of 'soft science' such as mental responsibility, conflicts among experts are common." *Ibid.* The court remanded for a hearing at which respondent will be given the opportunity to lay a foundation for his polygraph evidence. *Id.* at 10a. Judges Sullivan and Crawford dissented. *Ibid.*

c. In *Lynn*, respondent was charged with wrongfully using marijuana, conspiring to commit larceny, and larceny, in violation of Articles 112a, 80, and 121, UCMJ, 10 U.S.C. 912a, 880, and 921. App., *infra*, 25a. Before trial, respondent submitted to a polygraph examination by a private examiner, who concluded that respondent indicated no deception when denying his involvement in response to relevant questions about the fraud and drug allegations. *Id.* at 26a-27a. Relying on Rule 707, the military judge ruled that polygraph evidence inadmissible. App., *infra*, 28a. Respondent was convicted, and sentenced to a bad-conduct discharge, confinement for 12 months, total forfeitures, and reduction to the lowest enlisted grade. *Id.* at 25a-26a.

The Air Force Court of Criminal Appeals affirmed (App., *infra*, 30a-38a), but, citing its decisions in *Mobley* and *Nash*, *supra*, the United States Court of Appeals for the Armed Forces remanded for a hearing at which respondent will be given "an opportunity to lay a foundation for admission of his polygraph evidence." *Id.* at 29a. Judges Sullivan and Crawford dissented. *Ibid.*

REASONS FOR GRANTING THE PETITION

These cases present the same issue as *United States* v. *Scheffer*, in which we filed a petition for a writ of certiorari on January 16, 1997. In these cases, as in *Scheffer*, the Court of Appeals for the Armed Forces concluded that Military Rule of Evidence 707 violates the Sixth Amendment right of a testifying serviceman to present a defense at his court-martial. Because this Court's disposition of our petition in *Scheffer* will govern the proper resolution of these

cases, these cases should be held pending the Court's consideration and disposition of *Scheffer*.[3]

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's consideration and disposition of *United States* v. *Scheffer* (filed Jan. 16, 1997), and then disposed of accordingly.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MICHAEL J. BRESLIN
Lt. Colonel, USAF

JANUARY 1997

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[3] We have provided counsel for respondents with a copy of the government's certiorari petition in *Scheffer*.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 95-0758
Crim. App. No. 30881

UNITED STATES, APPELLEE

v.

CEDRIC W. MOBLEY, Sergeant
U.S. Air Force, APPELLANT

Argued May 8, 1996
Decided Sep. 18, 1996

OPINION OF THE COURT

GIERKE, Judge:

A general court-martial composed of officer members at Griffiss Air Force Base, New York, convicted appellant contrary to his pleas, of wrongfully using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. They acquitted appellant of a second specification of wrongfully using cocaine and one specification of wrongfully possessing

cocaine. The approved sentence provides for a bad-conduct discharge, confinement and partial forfeitures of pay for 12 months, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED IN HIS DENIAL OF DEFENSE'S REQUEST TO ALLOW THE TESTIMONY OF A POLYGRAPH EXPERT ON THE RESULTS OF THE ACCUSED'S PRIOR POLYGRAPHS.

We hold that the military judge erred by applying a *per se* ruling excluding polygraph evidence.

Before entry of pleas, appellant asked the military judge to order production and employment of Dr. Frank Sack, Ph.D. a private polygraph examiner. Defense counsel proffered evidence that Dr. Sack had administered three polygraph examinations to appellant, where appellant denied knowing ingestion of cocaine at the times and places charged. The defense proffer included a narrative description of the polygraph examinations, a resume reciting Dr. Sack's qualifications, and the report of examination, complete with charts, a narrative description, and tabulation of results.

Defense counsel argued that Mil.R.Evid. 707, Manual for Courts-Martial, United States (1995 ed.), is an unconstitutional limitation of appellant's Sixth Amendment right to present a defense. The military judge asked if defense counsel was "suggesting that this court should undertake to kind of embark on a constitutional foray, if you will, in trying to, in effect, violate the specific provisions of 707?" Defense coun-

sel responded, "I believe that Military Rule 707 is unconstitutional." The military judge refused to permit presentation of foundation evidence. He relied on the language of Mil.R.Evid. 707 and a commentator's opinion that "military judges cannot admit or entertain any motion seeking admission, at trial or *in limine*, [of] such testimony." *See* S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 213 (3d ed., 1996 Cumulative Supplement).

The Government's evidence of appellant's cocaine ingestion consisted solely of the results of a random urinalysis that tested positive for cocaine. Appellant testified that he suffers from a seizure disorder for which he takes prescribed medication. He has been warned that using alcohol or illegal drugs would trigger a seizure and risk death. He testified that he "did not know how that stuff got in my system. All I do know is that I did not do it." Appellant also presented testimony from supervisors and coworkers that it would be out of character for him to use illegal drugs.

Trial counsel cross-examined appellant at length, confronted him with the testimony against him, and argued to the court members that appellant lied "because he's got everything at stake in this court-martial."

A military judge's decision to admit or exclude evidence is tested on appellate review for abuse of discretion. We review a military judge's "conclusions of law under the *de novo* standard." If a military judge's ruling is based on "an erroneous view of the law," he has abused his discretion. *See United States v. Sullivan*, 42 MJ 360, 363 (1995); 1 S. Childress &

M. Davis, *Federal Standards of Review*, § 2.13 at 2-92 (2d ed. 1992).

Because appellant testified and placed his credibility as a witness in issue, the granted issue is ripe for appellate review. *United States v. Williams*, 43 MJ 348 (1995). For the reasons stated in *United States v. Scheffer*, No. 95-0521, —— MJ —— (1996), we hold that the military judge erred by applying a *per se* exclusionary rule to appellant's proffered evidence. Appellant is entitled to offer evidence of the scientific theory underlying polygraph evidence and application of that theory to appellant. *Id.* We cannot and need not determine from the record before us if Dr. Sack is a necessary and material foundation witness. *See United States v. Garries*, 22 MJ 288 (CMA 1986). If appellant can successfully lay a foundation, then Dr. Sack may be an essential witness to testify about the three polygraph examinations he conducted on appellant.

Because appellant tendered an *ex parte* polygraph examination, the military judge may require that appellant submit to examination by a government polygraph examiner as a condition of admissibility. *See United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989). Similarly, if the military judge suspects that appellant may have been "shopping" for a favorable examination, he may require disclosure of the results of all polygraph examinations as a condition of admissibility. *See* New Mexico Rule of Evidence 707. If conflicting polygraph evidence is presented, we expect the military judge to treat it like any other conflicting scientific evidence or expert opinion testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct.

2786, 2794 (1993) (rules of evidence contemplate "sensible triers of fact to evaluate conflicts").

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a military judge. Appellant will be provided an opportunity to lay a foundation for admission of the proffered polygraph evidence. If the military judge decides that the polygraph evidence is admissible, he will set aside the findings of guilty and the sentence, and a rehearing may be ordered. If the military judge decides that the polygraph evidence is not admissible, he will make findings of fact and conclusions of law. The record will be sent directly to the Court of Criminal Appeals for expeditious review. Thereafter, Article 67, UCMJ, 10 USC § 867 (1989), will apply.

Chief Judge COX and Senior Judge EVERETT concur.

SULLIVAN, Judge (dissenting):

I dissent for the reasons stated in my separate opinion in *United States v. Williams*, 43 MJ 348, 356 (1995) (Sullivan, C.J., concurring in the result).

CRAWFORD, Judge (dissenting):

I dissent for the reasons stated in my dissenting opinion in *United States v. Scheffer*, No. 95-0521/AF, —— MJ ——, —— (1996).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 95-0189
Crim. App. No. 30248

UNITED STATES, APPELLEE

v.

CHESTER NASH, JR., Staff Sergeant
U.S. Air Force, APPELLANT

Argued March 26, 1996

Decided Sep. 18, 1996

OPINION OF THE COURT

GIERKE, Judge:

A general court-martial composed of officer members at Hanscom Air Force Base, Massachusetts, convicted appellant, contrary to his pleas, of wrongfully using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. His approved sentence provides for a bad-conduct discharge, confinement for 3 months, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion dated October 7, 1994.

We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO PRESENT EVIDENCE OF A FAVORABLE POLYGRAPH RESULT CONCERNING HIS DENIAL OF USE OF DRUGS WHILE IN THE AIR FORCE.

We hold that the military judge erred by applying a *per se* exclusionary rule to appellant's proffered evidence.

Before trial, appellant underwent a polygraph examination by Dr. Frank Sack, Ph.D. He denied using or possessing cocaine during the period in question, and Dr. Sack found no deception when he answered pertinent questions. Six days after Dr. Sack's examination, appellant submitted to another examination administered by the Air Force Office of Special Investigations (OSI). The OSI examiner concluded that appellant's answers indicated deception.

Neither Dr. Sack nor the OSI examiner had traveled to the site of the court-martial. Trial counsel explained that both sides wanted "a preliminary ruling" from the military judge regarding admissibility of their testimony before they commenced travel to the site of the court-martial. The military judge ruled that neither side would be permitted to present polygraph evidence. He explained:

> I've considered the accused's Fifth and Sixth Amendment rights. However, in this case I have two polygraph exams administered by two different polygraph examiners which resulted in two different conclusions. . . . In light of the

> state of that evidence, I find that the risk of confusion of the factfinders with dueling polygraphers justifies the application of MRE [Mil. R.Evid.] 707 to this particular accused in this case. As the analysis to MRE 707 indicates it is a bright line rule that polygraph evidence is not admissible by any party at a court-martial even if stipulated to by the parties. I'd also note because there is in existence two conflicting polygraph exams, in light of that regard that they ask basically the same questions the results of those exams have little probative value. So even balancing the probative value of the exculpatory and the incriminatory polygraph exams—when that balancing test is done—it still is outweighed —any probative value is still outweighed by the risk of confusion to the factfinders in this court-martial.

The Government's case-in-chief consisted of evidence that appellant's urinalysis specimen tested positive for cocaine. Appellant testified on the merits and denied using cocaine. He testified that he did not know why his urine tested positive for cocaine. Appellant's wife testified that she had never known appellant to use drugs, and she attempted to account for his whereabouts during the time before the urinalysis. Staff Sergeant (SSgt) Lister, a friend of appellant, also attempted to account for his whereabouts.

In rebuttal, the Government produced evidence that appellant and SSgt Lister were not truthful and that appellant had a motive to lie to protect a separation bonus of approximately $24,000.00. In closing argument trial counsel argued that appellant had a motive to lie and did lie.

A military judge's decision to admit or exclude evidence is tested on appellate review for abuse of discretion. We review a military judge's "conclusions of law under the *de novo* standard." If the military judge's ruling is based on "an erroneous view of the law," he has abused his discretion. *See United States v. Sullivan*, 42 MJ 360, 363 (1995); 1 S. Childress & M. Davis, *Federal Standards of Review* § 213 at 2-92 (2d ed. 1992). Because appellant testified and placed his credibility in issue, the granted issue is ripe for appellate review. *United States v. Williams*, 43 MJ 348 (1995).

The military judge's ruling was incorrect on two counts. First, he relied on the *per se* exclusion under Mil.R.Evid. 707, Manual for Courts-Martial, United States (1995 ed.). *See United States v. Scheffer*, No. 95-0521, —— MJ —— (1996). Second, he based his conclusion that the evidence lacked probative value solely on the anticipated conflict between the two expert witnesses. The federal and military rules of evidence contemplate "sensible triers of fact to evaluate conflicts." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 2794 (1993); *see United States v. Mobley*, No. 95-0758, —— MJ ——, (6) (1996). In other areas of "soft science" such as mental responsibility, conflicts among experts are common. The mere fact that two experts disagree does not necessarily negate the probative value of both. "Under military law, . . . conflicting expert opinions are to be resolved by the triers of fact after evaluating them in the context of the totality of the evidence and after proper instructions by the military judge." *United States v. Dock*, 35 MJ 627, 635 (ACMR 1992), *aff'd*, 40 MJ 112 (CMA 1994).

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a military judge. Appellant will be provided an opportunity to lay a foundation for admission of the proffered polygraph evidence. If the military judge decides that the polygraph evidence is admissible, he will set aside the findings of guilty and the sentence, and a rehearing may be ordered. If the military judge decides that the polygraph evidence is not admissible, he will make findings of fact and conclusions of law. The record will be sent directly to the Court of Criminal Appeals for expeditious review. Thereafter, Article 67, UCMJ, 10 USC § 867 (1989), will apply.

Chief Judge COX and Senior Judge EVERETT concur.

SULLIVAN, Judge (dissenting):

I dissent for the reasons stated in my separate opinion in *United States v. Williams*, 43 MJ 348, 356 (1995) (Sullivan, C.J., concurring in the result).

CRAWFORD, Judge (dissenting):

I dissent for the reasons stated in my dissenting opinion in *United States v. Scheffer*, No. 95-0521/AF, —— MJ ——, —— (1996).

APPENDIX C

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

ACM 30881
22 March 1995

UNITED STATES

v.

SERGEANT CEDRIC W. MOBLEY, FR224-13-2724
United States Air Force

Before

SNYDER, SCHREIER, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

Appellant pled not guilty to three specifications of use or possession of cocaine in violation of Article 112a, Uniform Code of Military Justice. A panel acquitted him of two specifications, but returned a guilty finding on the remaining specification which involved a positive urinalysis. The court members sentenced him to a bad-conduct discharge, confinement for 1 year, reduction to E-1, and total for-

feitures. The convening authority modified the forfeitures to $414.00 per month for 12 months.

On appeal, appellant asserts three errors: 1) failure to grant a challenge for cause; 2) denial of polygrapher assistance and failure to admit polygraph results; 3) failure to give a requested spillover instructions. Finding no error we will affirm.

Lt Col K, one of the detailed court members, was a squadron commander on the appellant's base. Acting upon information in an OSI report and briefings, Lt Col K preferred charges against one of his squadron members. Some of the information contained in the OSI records was provided by Michelle M.—a witness in appellant's case. The defense counsel voiced "concerns" that Lt Col K may have formed an opinion as to Michelle M's credibility and that he could not be impartial in appellant's case.

During *voir dire*, Lt Col K stated that he did not specifically remember Michelle M's name from any OSI reports but that her testimony was familiar to an individual the OSI had discussed with him. The member stated that the information he had previously obtained from the OSI would not influence him and that he would objectively weigh the data in the case.

Defense counsel never formally challenged Lt Col K other than voicing his concerns. The military judge construed this concern as a challenge for cause. We shall do the same in the interest of justice. However, counsel are reminded that R.C.M. 912(f)(3) provides that counsel are to state their challenge and the grounds for it. Expressing one's "concern" about a court member is an inappropriate method to state a challenge for cause. *United States v. Blocker*, 32 M.J. 281 (C.M.A. 1991).

The standard of review concerning a military judge's decision on whether to grant a challenge for cause is whether the military judge clearly abused his or her broad discretion. *United States v. McLaren*, 38 M.J. 112, 119 (C.M.A. 1993). There is no abuse of discretion present as the record shows Lt Col K to be impartial and that his decisions on findings and sentences would solely be based on the evidence and the law. *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987). Further, the fact that defense counsel did not challenge Lt Col K is an indication of satisfaction with his answers.

The appellant's second error concerning polygrapher assistance and the admission of polygraph results has been rendered moot by *United States v. Scheffer*, —— M.J. —— (A.F. Ct. Crim. App. 1995) (en banc).

The final asserted error is the military judge's failure to give a requested spillover instruction. The tests for determining whether the refusal to give a defense requested instruction is error are whether: (1) the requested instruction is in itself a correct change; (2) it is not substantially covered in a given instruction; and (3) it is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired an effective presentation. *United States v. Aker*, 19 M.J. 733 (A.F.C.M.R. 1984). The requested instruction was not a proper spillover instruction and impermissibly invaded the province of the fact finder. *United States v. Haye*, 29 M.J. 213 (C.M.A. 1989). The trial judge's instructions properly informed the court members of the applicable law. We find no error in his refusal to give the proferred instruction.

The findings and the sentence are correct in law and fact, the sentence is not inappropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge SNYDER concurs.

Judge SCHREIER (concurring in part and dissenting in part):

I dissent from that portion of the opinion concerning the admissibility of polygraph information in this contested urinalysis case, for the same reasons detailed in Judge Pearson's dissent in *United States v. Scheffer*, —— M.J. —— (A.F. Ct. Crim. App. 1995) (en banc) which I joined.

[AIR FORCE SEAL]

OFFICIAL

/s/ Al J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

APPENDIX D

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

ACM 30248
7 October 1994

UNITED STATES

v.

STAFF SERGEANT CHESTER NASH JR., FR502-78-5805
United States Air Force

Before
SNYDER, PEARSON, and SCHREIER
Appellate Military Judges

SNYDER, Senior Judge:

A general court-martial convicted Staff Sergeant Nash, contrary to his pleas, of the wrongful use of cocaine, Article 112a, UCMJ, and sentenced him to a bad-conduct discharge, confinement for 3 months, and reduction to E-1, which the convening authority approved. He raises four assignments of error. Finding no error prejudicial to his substantive rights, we affirm.

Appellant's first assignment of error is that there is insufficient evidence in the record to determine whether his initial detailed defense counsel unilater-

ally withdrew from representing him. The allied papers of the record of trial reflect that Capt S represented appellant at the Article 32 Investigation. *See* Article 32, UCMJ; Rule for Courts-Martial (R.C.M.) 405. However, the military judge was not apprised of this fact when he inquired of appellant regarding his rights to counsel under Article 38(b), UCMJ. Appellant informed the military judge that he desired to be represented by Capt D and no one else.

Appellate defense counsel has submitted a release signed by appellant wherein he agrees and consents to Capt S' release due to his reassignment. In an effort to rebut the release, appellate defense counsel argue that there is insufficient evidence from which to conclude appellant was fully informed of his options before he signed the release, and that he may have released Capt S because he thought he had no choice. Counsel assert that, in the absence of additional documentation, this Court should direct a limited hearing to inquire into this matter. *See United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

Appellant relies on *United States v. Acton*, 33 M.J. 536 (A.F.C.M.R. 1991), and cases cited therein, to support his averment. We agree with appellant that detailed counsel may not unilaterally withdraw from representation. We disagree, however, that the record before us, as properly supplemented, is deficient. The release signed by appellant is straight forward. While it does not specifically state that he was aware he could insist on Capt S' representation, neither does it reflect he was not aware of his rights. In *Acton*, the record was entirely silent, and this Court stated therein that the result would have been different in the face of a release by the accused. We also note that

nowhere in the post-trial submissions is there any indication that appellant was deprived of counsel of his choice.

It is quite obvious that this issue could easily have been avoided had detailed counsel informed the military judge that appellant initially was represented by Capt S. In the event the military judge omits asking an accused if there was an attorney-client relationship with another counsel, counsel of record should, as an officer of the court, inform the military judge of any prior representation by another counsel so that a proper inquiry may be conducted.

Appellant's next assignment of error is that MIL. R. EVID. 707 unconstitutionally deprived him of his rights to due process and compulsory process of witnesses in violation of the Fifth and Sixth Amendments respectively. This averment arises as a result of the military judge having excluded the results of an exculpatory polygraph examination which appellant took prior to his trial. *See generally United States v. Rodriguez*, 37 M.J. 448 (C.M.A. 1993); *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987); *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994).

After considering the arguments at trial and the able briefs of the parties before this Court, we conclude that, *given the specific facts* of the case *sub judice*, we need not reach the constitutional question to dispose of this assignment of error. Instead, we conclude the military judge did not abuse his discretion by excluding the polygraph results under MIL. R. EVID. 403, because he allowed the defense and the prosecution the opportunity to present evidence to lay a proper foundation, and they failed to proffer sufficient evidence.

Before entering pleas, trial defense counsel made timely motions to admit the results of appellant's private polygraph examination and for the production of the polygrapher as a witness. The Government opposed the motions and, in the alternative, moved for admission of the results of a polygraph examination administered by the Air Force Office of Investigations (AFOSI) and for permission to present the testimony of the AFOSI polygrapher. After trial defense counsel asserted that MIL. R. EVID. 707 (a) could not preempt an accused's right to present evidence, the military judge inquired of trial defense counsel if he believed other rules of evidence applied with respect to relevancy. After trial defense counsel responded, "yes," the military judge stated:

> MJ: Well, why don't we go ahead. Although the government has stipulated to the facts in your motion, I'd like to see both polygraph exams because as part of the government's response, is a cross-motion to get theirs in, too. Is that correct?
>
> * * * * *
>
> MJ: I'm trying to sort out what we're going to do next. Is Mr. [S the polygrapher] available?
>
> DC: Yes, sir, he is. When I say he is available—he is in Utica, New York, waiting [sic] government travel orders. The government said they would not provide him with transportation.
>
> MJ: So we're not ready to proceed with the motion then?
>
> DC: Yes, sir.
>
> MJ: Trial Counsel?

TC: Your honor, I believe in our request we merely asked that a preliminary ruling be made as soon as possible to provide arrangements to have these polygraphers here. The polygrapher for the government is prepared to travel.

MJ: Where is he?

TC: He's in Andrews AFB, Maryland.

After a recess, the military judge ruled:

I've considered the accused's Fifth and Sixth Amendment rights. However, in this case I have two polygraph exams administered by two different polygraph examiners which resulted in two different conclusions. . . . In light of the state of that evidence, I find the risk of confusion of the fact finders with dueling polygraphers justifies the application of MRE 707 to this particular accused in this case. As the analysis to MRE 707 indicates it is a bright line rule that polygraph evidence is not admissible by any party at a court-martial even if stipulated by the parties. I'd also note because there is in existence two conflicting polygraph exams, in light of that regard that they ask basically the same questions the results of those exams have little probative value. So even balancing the probative value of the exculpatory and the incriminatory polygraph exams—when that balancing test is done—it still is outweighed—any probative value is still outweighed by the risk of confusion to the fact finders in this court-martial. Therefore, your motion to admit the exculpatory polygraph exam is denied; likewise, the government will not be allowed to admit their polygraph exam incriminating the accused.

MIL. R. EVID. 707(a) provides that "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." Prior to the effective date of this provision, the Court of Military Appeals ruled that results of polygraph examinations are not, *as a matter of law*, inadmissible in trials by court-martial. *Gipson*, 24 M.J. at 247 (emphasis added). In reaching its holding, however, the Court did not subscribe to the notion that an accused has a constitutional right to present favorable polygraph evidence under any or all circumstances. Any such evidence must be shown to be relevant and helpful to the disposition of the case at hand, and the proponent thereof shoulders the burden of demonstrating relevancy and helpfulness. *Gipson*, 24 M.J. at 252. Consequently, MIL. R. EVID. 707(a) aside, all an accused is entitled to is the opportunity to present evidence which may successfully discharge the burden. As with evidentiary matters, this issue is addressed to the discretion of the military judge.

As the record reflects, the military judge did not base his ruling solely on the MIL. R. EVID. 707(a) exclusion, but—instead—availed trial defense counsel of the opportunity to demonstrate the relevancy of the proffered evidence. *Cf. Williams*, 39 M.J. at 558. The supporting documents to which trial and defense counsel referred during their respective arguments reflected no more than the "relevant questions" asked by the polygraphers and their respective conclusions. There was no proffer of evidence regarding the specifics as to how the examinations were conducted. *See Rodriguez*, 37 M.J. at 452-53. Defense counsel did not press for the polygrapher's presence. He did

not apprise the military judge of what the expected testimony of appellant's polygrapher would be with regards to the principles involved in polygraphs, the calibration of the polygraph machine, etc., or the qualifications of the polygrapher. This could have been done either via an offer of proof or a stipulation of expected testimony. Trial counsel also failed to address these matters.

We conclude this is not a case where MIL. R. EVID. 707(a) precluded an accused from presenting evidence to the court-martial. In view of the limited evidence presented in support of the motion after being afforded the opportunity to do so, we are constrained to conclude that the military judge did not abuse his discretion by denying the motion. *See Gipson*, 24 M.J. 246.

Appellant also attacks the legal and factual sufficiency of the evidence. To find a conviction legally sufficient, this court must determine that, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). To find a conviction factually sufficient, we must determine that, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we personally are convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Having reviewed the evidence, we too are convinced, beyond a reasonable doubt, of appellant's guilt.

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant claims ineffective assistance of counsel. The specific derelictions alleged

are: counsel's failure to request a retest of appellant's urine for ecgoninemethylester (EME), and the failure to properly investigate and prepare for trial. The specifics of the latter allegation is that trial defense counsel accepted and relied on the appointed expert consultant, who worked for the Armed Forces Drug Testing Laboratory, instead of obtaining an independent toxicologist, he failed to investigate the allegation that appellant's neighbor adulterated appellant's urine sample, and trial defense counsel failed to subpoena appellant's father, a retired Chief Master Sergeant, as a witness.

Capt D, the trial defense counsel, answered these allegations in his response affidavit. He states that, due to the extremely brief time which EME can be detected in one's urine and because the absence of EME in a retest would not, under the circumstances of appellant's case, indicate innocence, he had no good faith basis on which to request a retest for the presence of EME. As for the neighbor's involvement, Capt S pursued that theory prior to the pretrial investigation without success. In addition to reviewing the pretrial investigation, Capt D interviewed the noncommissioned officer in charge of the base laboratory and concluded the chain of custody of appellant's urine sample was intact. Capt D finalizes his affidavit by stating appellant never requested his father's presence and that his father's testimony was not relevant to appellant's defense, in light of the testimony of the other strong character witnesses presented. Moreover, Capt D states that appellant advised him there was a family emergency elsewhere which required his father's presence.

To demonstrate ineffective assistance of counsel, appellant must establish a two-pronged premise.

First, that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the deficient performance must have prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987), quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064; *accord United States v. Lonetree*, 35 M.J. 396, 412-13 (C.M.A. 1992).

In testing for whether an appellant has carried this burden, this Court resolves three basic questions: (1) Are appellant's allegations true and, if so, is there a reasonable explanation for counsel's actions in the defense of the case? (2) If true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? and (3) If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt regarding guilt? *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

We find appellant has not carried his burden on any of the *Polk* items. The record does not reflect any reason to disbelieve Capt D with regards to appellant's father. Second, as stated, finding no EME in a retest of appellant's urine would not have detracted from the weight of the Government's test. Appellant is not entitled to an expert of choice, and there is no indication that the appointed expert's consultation was deficient. Appellant conceded on cross-examination that his neighbor was not implicated or involved in his urine sample testing positive for a

cocaine metabolite. The record reflects Capt D's preparation for trial. The fact that apparently he opted to litigate the polygraph results on the basis of the constitutionality of MIL. R. EVID. 707(a), rather than 403, does not detract from this conclusion.

Accordingly, the findings and sentence are correct in law and fact, Article 66(c), UCMJ, and are hereby

AFFIRMED.

Judges PEARSON and SCHREIER concur.

[Air Force Seal]

OFFICIAL

/s/ Al J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 95-0346
Crim. App. No. 30133

UNITED STATES, APPELLEE

v.

CHAD E. LYNN, Airman First Class
U.S. Air Force, APPELLANT

Submitted June 27, 1995
Decided Oct. 10, 1996

OPINION

GIERKE, Judge:

A general court-martial composed of officer members at McClellan Air Force Base, California, convicted appellant, contrary to his pleas, of wrongful use of marijuana, conspiracy to commit larceny, and larceny, in violation of Articles 112a, 80, and 121, Uniform Code of Military Justice, 10 USC §§ 912a, 880, and 921, respectively. The adjudged and approved sentence provides for a bad-conduct discharge, confinement for 12 months, total forfeitures, and re-

duction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence.

We granted review of the following issues:

I

WHETHER APPELLANT'S FIFTH AMENDMENT RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHT TO PRODUCE FAVORABLE WITNESSES WAS VIOLATED BY THE FINDING OF THE MILITARY JUDGE THAT HE WAS WITHOUT DISCRETION TO DECIDE THE ADMISSIBILITY OF FAVORABLE POLYGRAPH EVIDENCE AND HIS RULING, PURSUANT TO MIL.R.EVID. 707, THAT ANY SUCH EVIDENCE WAS INADMISSIBLE PER SE.

II

WHETHER APPELLANT'S FIFTH AMENDMENT RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHT TO PRODUCE FAVORABLE WITNESSES WAS VIOLATED BY THE ADMONISHMENT OF THE MILITARY JUDGE, PURSUANT TO MIL.R.EVID. 707, AGAINST EVEN MENTIONING THE WORD "POLYGRAPH," THUS PRECLUDING APPELLANT FROM TESTIFYING ABOUT HIS OFFER TO SUBMIT TO A GOVERNMENT POLYGRAPH EXAMINATION.

Before trial, appellant submitted to a polygraph examination by a private examiner, Mr. Douglas E. Holbrook. During the examination, appellant denied smoking marijuana, denied conspiring with another airman to wrongfully use credit card numbers, denied furnishing his alleged co-conspirator with credit card

numbers, and denied wiring $300.00 to "someone in Washington" using his landlady's credit card number. Mr. Holbrook found no deception when appellant answered the relevant questions. Appellant offered to take a government polygraph, but the Government declined his offer.

The polygraph issue arose in connection with appellant's motion to dismiss for lack of speedy trial. Defense counsel pointed out that while appellant was awaiting trial, Mil.R.Evid. 707, Manual for Courts-Martial, United States (1995 ed.) became effective, precluding appellant from offering polygraph evidence. Defense counsel argued that if appellant had received a speedy trial, he would have been entitled to lay a foundation for his exculpatory polygraph evidence. The military judge denied the motion to dismiss. His ruling on the motion included the following statements:

> Fifth, *U.S. v. Gipson*, 24 MJ 246 (CMA 1987) did not suggest that polygraph evidence was admissible. Appellant still maintained the burden of establishing a foundation for its admissibility. After allowing evidence as to the reliability of the polygraph and the examiner, discretion remained vested in the Military Judge as to the admissibility of the results. There never was an automatic admission of polygraph evidence under Military Law.
>
> Sixth, Change 5 to the MCM precludes the admission of polygraph evidence, thus removing the discretion of the Military Judge.

Defense counsel conceded that admission of polygraph evidence under *Gipson* was discretionary, but

argued that the delay in the trial deprived the defense of the opportunity to convince the military judge that the polygraph evidence should be admitted on the merits. The military judge responded, "Okay. I understand your position on that."

Defense counsel did not challenge the constitutionality of Mil.R.Evid. 707 and made no further proffer of polygraph evidence on the merits.

The Government moved *in limine* to prevent any mention of appellant's polygraph examination. The military judge deferred ruling on the motion *in limine* but warned "both sides that you know that Rule 707 precludes the admission of polygraph evidence." He admonished both counsel: "[Y]ou are directed not to ram the evidence of polygraph through a closed door, just to get in in front of the members."

Appellant testified on the merits. He admitted knowing that the money in question had been wired, but denied that he was the one who wired it. He denied being part of a credit-card scam and denied using marijuana. In rebuttal, the Government called appellant's supervisor, who testified that appellant had a reputation as a liar.

After appellant was convicted, defense counsel proferred the polygraph results for consideration on sentencing. The military judge responded, "I've already ruled that polygraph is inadmissible." Defense counsel argued that the rules are relaxed on sentence, but the military judge was adamant, ruling, "We will not admit the polygraph results."

We hold that defense counsel made a sufficient proffer of the polygraph evidence to preserve the issue for appellate review. Once the military judge made it clear that he considered such evidence *per se* inadmissible and cautioned counsel for both sides

against any mention of the evidence, we would not expect counsel to challenge the military judge further. We hold that the military judge erred. *See United States v. Mobley*, No. 95-0758, —— MJ —— (Sept. 18, 1996); *United States v. Nash*, No. 95-0189, —— MJ —— (Sept. 18, 1996).

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a military judge. Appellant will be provided an opportunity to lay a foundation for admission of his polygraph evidence. If the military judge decides that the polygraph evidence is admissible, he will set aside the findings of guilty and the sentence, and a rehearing may be ordered. If the military judge decides that the polygraph evidence is not admissible, he will make findings of fact and conclusions of law. The record will be sent directly to the Court of Criminal Appeals for expeditious review. Thereafter, Article 67, UCMJ, 10 USC § 867 (1989) will apply.

Chief Judge COX concurs. Judge EFFRON concurs in the result.

SULLIVAN, Judge (dissenting):

See my separate opinion in *United States v. Williams*, 43 MJ 348, 356-57 (CMA 1993).

CRAWFORD, Judge, (dissenting):

See my separate opinion in *United States v. Scheffer*, No. 95-0521, —— MJ ——, —— (Sept. 18, 1996).

APPENDIX F

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

ACM 30133
18 November 1994

UNITED STATES

v.

AIRMAN FIRST CLASS CHAD E. LYNN,
FR537-80-9560
United States Air Force

Before

DIXON, YOUNG, and BECKER
Appellate Military Judges

OPINION OF THE COURT

BECKER, Judge:

Despite his pleas, members convicted the appellant of one specification of using marijuana in violation of Article 112a, UCMJ,[1] one specification of conspiracy to commit larceny in violation of Article 81, UCMJ,[2] and one specification of larceny in violation

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[1] 10 U.S.C. § 912a (1988).

[2] 10 U.S.C. § 881 (1988).

of Article 121, UCMJ.[3] He was sentenced to a bad-conduct discharge, 12 months confinement, forfeiture of all pay and allowances, and reduction to E-1.

This case began when Angela H contacted the McClellan Air Force Base, California, detachment of the Air Force Office of Special Investigations (AFOSI) and related that the appellant had told her he had been obtaining credit card account numbers and making unauthorized charges. According to Angela H, this conversation occurred during a date with the appellant and while the two were sharing some marijuana. Based on Angela H's information, AFOSI apprehended an Airman Fouad ("Freddy") Taleb, an acquaintance of both the appellant and Angela H. Airman Taleb then implicated the appellant in a scheme in which the appellant would provide Taleb with credit card account numbers of customers at a lumber yard where the appellant worked off duty. According to Airman Taleb, the appellant also provided him a credit card number belonging to the accused's landlady, and told him that he had used that number himself to wire $300 to an ex-girlfriend. At the appellant's trial, prosecution witnesses included Angela H, Airman Taleb,[4] the ex-girlfriend, the accused's former supervisor at the lumber yard, the accused's landlady, and one lumber yard customer whose credit card number had been used by Taleb for unauthorized purchases.

Appellant asserts four assignments of error: (1) the military judge committed plain error in failing

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[3] 10 U.S.C. § 821 (1988).

[4] Airman Taleb had previously pled guilty at a general court-martial, in accordance with a pretrial agreement which required him to testify against the appellant.

to include Angela H in his accomplice instruction, despite the defense's failure to make such a request; (2) the evidence of the appellant's use of marijuana is factually insufficient; (3) ineffective assistance of counsel; and (4) the evidence of conspiracy is legally and factually insufficient. We find no error and affirm. Two of the appellant's arguments merit extended discussion.

ANGELA H AND THE ACCOMPLICE INSTRUCTION

The military judge gave the standard instruction admonishing the members to take special care in evaluating the credibility of witnesses who are accomplices in the alleged criminal acts. In doing so, he identified only Airman Taleb as an accomplice. Without question, Angela H was also an accomplice, in that she participated with the accused in using marijuana. If the defense had requested her inclusion in the instruction, the military judge would have committed error had he refused. However, failure of the defense to request an accomplice instruction waives any error, unless the omission of the instruction rises to the level of "plain error." Rule for Courts-Martial (R.C.M.) 520(f); *United States v. Gittens*, 39 M.J. 328, 331 (C.M.A. 1994); *United States v. Gillette*, 35 M.J. 468, 470 (C.M.A. 1992). Appellant argues that the military judge's failure to include Angela H in the accomplice instruction was plain error because her testimony was the sole evidence of the alleged marijuana offense and her credibility had been considerably impeached, citing *United States v. Sanders*, 34 M.J. 1086, 1092-93 (C.M.A. 1992).

Appellant might have a point if all we had here was a *failure to request* the accomplice instruction. Unfortunately for the appellant, this is not the case. Rather, the record shows the defense *affirmatively waived* Angela H's inclusion in the instruction. During the Article 39(a)[5] session before argument, both counsel agreed to an accomplice instruction which mentioned only Airman Taleb. There was no discussion of Angela H. After arguments and instructions, the military judge asked both counsel, in front of the members, if either had any requests for additional instructions. This prompted the following exchange:

> TC: Your honor. we would ask that in addition to the instructions, you also advise the Court members that in regard to Angela [H], she is also technically an accomplice, because she smoked marijuana with Airman Lynn. So, the same consideration should be given to her.
>
> CIV DC: No Your Honor. I would object to that at this time. That I think—should have been brought up before we agreed on the jury instructions. I would object to that, Your Honor, being untimely.
>
> TC: Since counsel objects, I will withdraw my comments.
>
> MJ: Very well. Based on that, I will not give the instruction as to accomplice for Mrs. [H].
>
> Any additional requests or exceptions?
>
> CIV DC: No Your Honor.

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[5] 10 U.S.C. § 839(a) (1988).

We decline to find "plain error" where, as here, the accused has *affirmatively waived* the accomplice instruction, as opposed to simply failing to request it. To hold otherwise would run afoul of the doctrine of "invited error"—we will not grant an appellant relief for an instructional error which he persuaded the military judge to make. *See United States v. Roberts*, 25 F.3d 1420 (9th Cir. 1994); *United States v. Herrera*, 23 F.3d 74 (4th Cir. 1994); and *United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994). *See also United States v. Spears*, 39 M.J. 823 (A.F.C.M.R. 1994).

INEFFECTIVE ASSISTANCE OF COUNSEL

Before his trial, the appellant released both his detailed and individually requested Air Force defense counsel and hired a civilian attorney, Mr. B. Appellant has not personally asserted Mr. B was ineffective. Rather, his appellate defense counsel base this assignment solely on the record. Appellate defense counsel draw our attention to many instances where they allege Mr. B made tactical errors and displayed unfamiliarity with military procedure. They also claim Mr. B was ineffective in his post-trial representation of the appellant, in that he failed to submit any clemency matters to the convening authority or respond to the staff judge advocate's recommendation. *See* R.C.M. 1105, 1106.

The record reveals that Mr. B was not completely familiar with court-martial procedure. We suspect he may not have interviewed every witness before trial. He made one major gaffe. Apparently, the appellant told Mr. B that he had not worked at the lumber yard on 10 December 1990. This was an

important date because a customer, whose credit card number had fallen into Taleb's hands, had called in an order on that day. Mr. B announced to the members in opening statement that the accused had not worked on 10 December. On cross-examination of the appellant's supervisor at the lumber yard, Mr. B asked him to search company records and return to court with evidence of whether the accused had worked that day. Meanwhile, the appellant testified that he had not been present at the lumber yard on 10 December. However, the supervisor returned with evidence that the appellant had indeed "clocked in" at the yard on 10 December, and testified to that effect in rebuttal. Obviously, this turn of events did not help the appellant.

Apart from his mistakes, Mr. B conducted an aggressive defense of the appellant. He made numerous motions and objections revealing significant research into military law and procedure. His cross-examinations of prosecution witnesses were effective in bringing across his theory of the case and setting the stage for the appellant's own testimony. In the pre-sentencing phase of the trial, Mr. B did not present any evidence on behalf of his client. However, this could easily have been a tactical choice.[6]

The requirements for reversing a conviction for ineffective assistance of counsel are twofold: the appellant must show (1) his counsel's performance

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[6] In the prosecution's rebuttal case during findings, the appellant's military supervisor testified that, in his opinion, the accused was a "liar" and that he had a reputation as such within his duty section. *See* Mil. R. Evid. 608(a). The accused's sole performance report was less than sterling, and he had received a letter of reprimand for unauthorized absence from duty.

was so deficient that he was, in effect, not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) his counsel's errors were so serious as to deprive him of a fair trial, that is, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). Concerning the first prong of the test, counsel's competence is presumed unless the accused can point out specific errors which were unreasonable under prevailing professional norms. *United States v. Cronic*, 466 U.S. 648, 666 (1984); *Strickland*, 466 U.S. at 688; *United States v. Harris*, 34 M.J. 297, 299 (C.M.A. 1992). Mere mistakes and errors in judgement have never been sufficient to overcome this presumption of competence. *United States v. Rivas*, 3 M.J. 282, 287 (C.M.A. 1977); *United States v. Garcia*, 18 M.J. 716, 718 (A.F.C.M.R. 1984), *aff'd*, 25 M.J. 159 (C.M.A. 1987); *United States v. Coronado*, 15 M.J. 750, 752 (A.F.C.M.R. 1983), *pet. denied*, 18 M.J. 11 (C.M.A. 1984). The contention that Mr. B was ineffective fails both prongs of the *Strickland/Scott* test.

Mr. B's trial performance, although not sparkling, did not fall below acceptable professional norms. Even his misjudgment concerning whether the accused worked at the lumber yard on 10 December 1990, although significant, did not render his assistance "ineffective." We would expect most seasoned defense counsel to have checked out his client's averments before making an opening statement and presenting testimony. We certainly do not recommend Mr. B's in-court discovery practices to budding trial lawyers. Notwithstanding, "[w]e do not require defense counsel to be clairvoyant in their relationship with a client." *United States v. Washington*, 29 M.J.

536, 539 (A.F.C.M.R. 1989). We are not prepared to label a defense counsel "ineffective" solely because he trusted his client.

Even assuming Mr. B's efforts fell below the standard set out by the first prong of the *Strickland/Scott* test, we are not persuaded that a better performance would have affected the trial result. Appellant's involvement with Airman Taleb in the credit card scam was thoroughly proven. Airman Taleb's testimony was corroborated by direct and circumstantial evidence from unimpeached sources. Although Angela H used marijuana along with the accused, the record reveals no motive to lie on her part. The accused's sentence was comfortably under the maximum, and is appropriate for the offenses and the accused.

Nor do we find Mr. B's post-trial performance to have been "ineffective." As with his trial performance, we presume counsel discharged his post-trial responsibilities competently. The record shows accused and counsel were fully informed of the opportunity to present matters to the convening authority before action on the findings and sentence. The record also contains an affidavit from a paralegal in the McClellan Air Force Base legal office which states that the paralegal personally contacted the appellant and confirmed his decision not to submit any matters to the convening authority. Appellant has not claimed Mr. B failed to follow his instructions in any way. Under the circumstances, we infer Mr. B did exactly what his client wanted—nothing. *See United States v. Robertson*, 39 M.J. 211, 218 (C.M.A. 1994).

REMAINING ISSUES

We resolve the remaining assignments of error against the appellant. With appropriate deference to the members' opportunity to see and hear the witnesses, we are persuaded beyond a reasonable doubt that the accused is guilty of using marijuana. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The evidence is legally sufficient to support the finding that the accused is guilty of conspiracy to commit larceny. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). We are also persuaded beyond a reasonable doubt that the appellant is guilty of that offense. *Turner*.

Based on the entire record, we find that all findings of guilt and the sentence are correct in law and fact. Accordingly, they are

AFFIRMED.

Chief Judge DIXON and Judge YOUNG concur.

[Air Force Logo]

OFFICIAL

/s/ Al J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

APPENDIX G

Military Rule of Evidence 707 provides:

> Rule 707. Polygraph Examinations
>
> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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